No. 82-1832

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

TOWN OF HALLIE, TOWN OF SEYMOUR
TOWN OF UNION and TOWN OF WASHINGTON, *Petitioners*,

v.

CITY OF EAU CLAIRE, *Respondent*.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF AMICI CURIAE AMERICAN PUBLIC POWER ASSOCIATION, AMERICAN ASSOCIATION OF PORT AUTHORITIES, CITY OF CLEVELAND, OHIO, THE MICHIGAN CITIES OF DETROIT, GRAND RAPIDS, LANSING, AND TRAVERSE CITY, AND THE TENNESSEE CITIES OF NASHVILLE, MEMPHIS, AND CHATTANOOGA IN SUPPORT OF RESPONDENT

CARLOS C. SMITH
Counsel of Record
FREDERICK L. HITCHCOCK
EDWARD D. MEYER
STRANG, FLETCHER, CARRIGER, WALKER, HODGE & SMITH
1200 Maclellan Building
Chattanooga, Tennessee 37402
(615) 266-2721
Counsel for Amici Curiae

JOHN W. PESTLE
VARNUM, RIDDERING, SCHMIDT & HOWLETT
Suite 800
171 Monroe Avenue, N.W.
Grand Rapids, Michigan 49503
(616) 459-4186
Special Counsel for the Michigan Cities of Detroit, Grand Rapids, Lansing and Traverse City

STANLEY P. HEBERT
66 Jack London Square
Oakland, California 94604
(415) 444-3188
Special Counsel for American Association of Port Authorities

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

JOHN D. MADDOX
Director of Law
JUNE W. WIENER
Assistant Director of Law
City Hall Room 106
601 Lakeside Avenue
Cleveland, Ohio 44114
(216) 664-2800
Counsel for City of Cleveland, Ohio

CLIFFORD D. PIERCE, JR.
City Attorney
City Hall Room 314
125 North Main Street
Memphis, Tennessee 38103
(901) 526-6701
Counsel for the City of Memphis, Tennessee

DONALD W. JONES
Metropolitan Attorney
204 Metropolitan Courthouse
Nashville, Tennessee 37201
(615) 259-6134
Counsel for the Metropolitan Government of Nashville and Davidson County, Tennessee

EUGENE N. COLLINS
City Attorney
RANDALL L. NELSON
Special Counsel
400 Pioneer Bank Building
Chattanooga, Tennessee 37402
(615) 756-2291
Counsel for the City of Chattanooga, Tennessee

TABLE OF CONTENTS

Table of Contents Continued

TABLE OF AUTHORITIES

Table of Authorities Continued

Table of Authorities Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 82-1832

TOWN OF HALLIE, TOWN OF SEYMOUR
TOWN OF UNION and TOWN OF WASHINGTON, *Petitioners*,

v.

CITY OF EAU CLAIRE, *Respondent*.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF AMICI CURIAE AMERICAN PUBLIC POWER ASSOCIATION, AMERICAN ASSOCIATION OF PORT AUTHORITIES, CITY OF CLEVELAND, OHIO, THE MICHIGAN CITIES OF DETROIT, GRAND RAPIDS, LANSING, AND TRAVERSE CITY, AND THE TENNESSEE CITIES OF NASHVILLE, MEMPHIS, AND CHATTANOOGA IN SUPPORT OF RESPONDENT

INTERESTS OF THE AMICI

Letters from counsel for Petitioners and Respondent consenting to the filing of this brief are on file with the Clerk of the Court.

The American Public Power Association ("APPA") is a national service organization representing some 1,750 local, publicly-owned electric utilities throughout the United States. The public power systems represented by APPA vary in size from very large retail power suppliers such as the cities of Los Angeles, Seattle, and Memphis, to much smaller publicly-owned electric utilities serving the citizens of villages and towns. The publicly-owned utilities represented by APPA are operated on a non-profit basis for the benefit of their consumers-owners. Their purpose is not to enrich shareholders as with privately-owned utilities, but to make the advantages of public power broadly available at reasonable cost.

As in the case of other units of local government, publicly-owned power systems have observed with growing anxiety the explosion in antitrust litigation occasioned by *City of Lafayette* v. *Louisiana Power & Light*, 435 U.S. 389, and its progeny. Officials of publicly-owned power systems are greatly concerned about the present uncertain state of the antitrust law as it applies to the operation of all aspects of local government. This uncertainty has threatened the ability of publicly-owned utilities to provide low-cost electric service and to respond to the demands of their citizens for new or expanded services.

Organized in 1912, the American Association of Port Authorities ("AAPA") is the Washington, D.C. based trade association which represents 76, virtually all, deep-draft port authorities in the United States and is their principal advocate on national issues. These ports are organized as public authorities by multi-state, state, or local government compact, legislative action, or charter and traditionally operate public facilities as government activities. AAPA members are concerned that expanding the scope of the antitrust laws to include port operations would impair their ability to provide services required for American economic and defense interests and to compete effectively in international trade.

The City of Cleveland, Ohio, the Michigan Cities of Detroit, Grand Rapids, Lansing and Traverse City, and the Tennessee Cities of Nashville, Memphis, and Chattanooga, join this brief because they believe that the application of the antitrust laws to them will impair their ability to take regulatory actions to promote the health, safety, and welfare of their citizens and to deliver needed services to their communities.

In their brief, *Amici* present authorities and arguments that support the adoption by this Court of a rule of law that will reduce the risk of antitrust liability faced by local government units. *Amici* believe that reduction both of the risk of antitrust liability and of the uncertainty inherent in the present unsettled condition of the law is essential to permit the effective and efficient operation of publicly-owned utilities and other local government units.

SUMMARY OF THE ARGUMENT

The *Amici* urge the Court to affirm the holding of the Seventh Circuit Court of Appeals. In addition, *Amici* urge the Court to take this opportunity to clarify the application of the state action doctrine to local governments by adopting a more flexible approach similar to that used by the Court of Appeals below.

Since the Court's decision in *Lafayette* v. *Louisiana Power and Light* six years ago, the exposure of local governments to federal antitrust liability has seriously impaired the ability of such governments to discharge their public duties. In many cases, local governments and their officials have been paralyzed by the fear that public and personal treasuries would be bankrupted by the litigation of antitrust actions and the payment of treble damages, if a plaintiff should prevail. This paralysis has been the result, in part, of the inability of local government officials to discern in the Court's opinions a reasonable basis upon which to predict the antitrust consequences of their actions.[1]

As a result, the Court should hold that local government units are immune from antitrust liability when their actions affecting competition reasonably follow from authority granted by the State. State authority for a local government unit to act in a particular area affecting commerce should be deemed to constitute a clearly articulated and affirmatively expressed intention to displace competition within that area of commerce. Further, there should be no requirement of active state supervision of local government. Such a requirement would be redundant, because the State's normal political processes provide continuing oversight of local governments. A requirement for more intensive supervision would defeat the purpose of local government.

The promotion of "competition" by governmental units will not necessarily further the social or economic objectives of the Sherman Act. The legislative history of the Sherman Act evidences no intention to apply the Act's proscriptions to local

[1] *See* H.R. Rep. No. 965, 98th Cong., 2d Sess., 7 (1984)

government activities. Acceptance of the Petitioners' argument that state authorization must be so specific that local governments do not even have the discretion to decline to act would eviscerate local governments and destroy their effectiveness as a subordinate unit of state government. Adoption of such a rule would also interfere with important federal interests, including this Court's interest in permitting States broad latitude in ordering their affairs and those of their local governmental units.

ARGUMENT

I. THE THREAT OF BROAD ANTITRUST LIABILITY IS SERIOUSLY DISRUPTING THE EFFECTIVE AND ORDERLY ADMINISTRATION OF THE AFFAIRS OF LOCAL GOVERNMENT.

For 88 years prior to the Court's decision in *Lafayette*, it was generally assumed that the Sherman Act, 15 U.S.C. § 1, *et seq.*, (herein the "Sherman Act") had not been designed to constrain the activities of local government. Yet, in the six years since *Lafayette*, local government officials have seen that assumption overturned and three centuries of local government tradition, organization, and experience threatened.

The facts of this case illustrate the way in which the antitrust laws now threaten the erosion of historical local government roles. The Petitioners, four Wisconsin towns, have sought to bootstrap a political dispute into a claim under the antitrust laws. Amazingly, the Towns have alleged that the provision of local sanitary sewerage services to local residents is an activity involving trade or commerce under the Sherman Act. The Towns have further sought to characterize the City's management of a scarce public resource as the acquisition of "monopoly power in sewage treatment services with an intent to abuse that power . . . ."[2] The characterization of the City's traditional public activity as being motivated only by the avarice of the private monopolist is ludicrous. Unfortunately, the Petitioners' efforts are not unusual among those who seek to use the antitrust laws to intimidate local governments.[3]

[2] Brief for Petitioners at 29.

Mr. Justice Stewart in his dissenting opinion in *Lafayette* aptly identified the variety of problems that would flow from the decision to extend the reach of the Sherman Act to local government. Mr. Justice Stewart pointed out that the plurality's opinion improperly characterized local governments as functionally equivalent to private commercial enterprises, improperly interfered with state sovereignty by limiting the ability of state governments to delegate authority to local government, and threatened both unnecessary judicial interference with affairs of local government and the imposition of huge costs on municipal governments and their citizens.[4] The plurality dismissed Mr. Justice Stewart's dire predications with the comment, "That, with respect, is simply hyperbole."[5]

With respect, Mr. Justice Stewart's predictions have become reality. Developers in Illinois have obtained a judgment of $28.5 million dollars against the citizens of Grayslake and Lake County, Illinois, and several of their public officials.[6] The *Grayslake* verdict is equal to 6,000 percent of the total property tax collected in 1983 by the Village of Grayslake and 150 percent of the property tax collected by Lake County.[7]

[3] The Petitioner, Town of Hallie, brought this federal antitrust suit after it had lost a suit involving similar facts brought under state law. *Town of Hallie* v. *City of Chippewa Falls*, 105 Wis. 2d 533, 314 N.W.2d 321 (1982). After its unsuccessful effort under state law, the Town of Hallie turned to the federal antitrust laws, with their treble damage penalties, to resolve this intergovernmental policy dispute.

[4] 435 U.S. 426-441.

[5] 435 U.S. at 416.

[6] *Unity Ventures, et al.* v. *County of Lake, et al.*, No. 81 C 2745 (N.D. Ill.) (hereinafter referred to as "*Grayslake*"). Post-trial motions are now pending.

[7] Defendants' Memorandum in Support of Their Rule 50(b) and Rule 59(a) Motion, at 1, *Unity Ventures, et al.* v. *County of Lake, et al.*, No. 81 C 2745 (N.D. Ill.). As in the instant case, the *Grayslake* case involved a political dispute between local government units concerning strategies for develop-

In another case, the former mayor of Houston, acting in a politically expedient, but never allegedly corrupt, manner was subjected to personal liability for $6.3 million in an antitrust suit arising out of his official action. The judgment was subsequently reversed, then reinstated on appeal, and, finally, reversed by the Fifth Circuit *en banc*, with the warning that the mayor's pre-*Lafayette* action justified a qualified immunity that will be available to no future public official.[8]

Other local governments have had to retreat from the exercise of their official governmental responsibilities in the face of antitrust lawsuits seeking huge damage awards. In Richmond, Virginia, city officials, faced with an antitrust claim in excess of their city's annual budget, abandoned efforts to promote urban redevelopment, made multi-million dollar payments to the antitrust plaintiff, and permitted the plaintiff, in effect, to plan a part of Richmond's downtown, an activity that the electorate thought they had delegated to city officials.[9] City officials in Rancho Mirage, California, disavowed a voter-approved denial of zoning for a large hotel and residential development after being faced with a $240 million antitrust lawsuit by the developers. The majority of the 7,000-person City had approved the denial of the zoning in a referendum, but City officials were forced to ignore the public will and approve the project out of fear that the City, with its $4 million budget,

---

ment and allocation of the cost of sewerage facilities. The dispute arose when the Village of Round Lake Park granted the plaintiffs' request for high density zoning. Then, instead of choosing to use a sewerage system over which Round Lake Park had jurisdiction, the developers demanded that they be permitted to use a separate sewerage system over which the Village of Grayslake and Lake County had jurisdiction. Because of their different governmental policies, the Village of Grayslake and Lake County refused to permit the plaintiffs in the Village of Round Lake Park to shift to the defendants' taxpayers major costs associated with the plaintiffs' high-density development. *Id.* at 2. *See also* H. R. Rep. No. 965, 98th Cong., 2d Sess., 10, n. 14 (1984).

[8] *Affiliated Capital Corp.* v. *City of Houston*, 519 F.Supp. 991 (S.D.Tex. 1981), *rev'd*, 700 F.2d 226 (5th Cir. 1983), *on reh'g*, 735 F.2d 1555 (1984).

[9] Nat'l Journal, June 18, 1983.

would be bankrupted.[10] The mayor of Charleston, South Carolina, was forced to withdraw a transportation proposal designed to limit motor vehicle traffic in a renovated historical district after being faced with the threat of a lawsuit by a local transit company. The mayor explained that the proposal was being withdrawn to avoid expensive antitrust litigation.[11]

Earlier this year, the Senate Judiciary Committee, in its report to accompany S. 1578,[12] concluded that antitrust liability for local government is having a destructive effect on the ability of local governments to function:

> . . . Perhaps the most probative evidence of the effect of *Lafayette* and *Boulder* comes from local government officials themselves. Speaking on behalf of the National Association of Counties, the Honorable James C. Leventis, Chairman, Richland County Council, State of South Carolina, imparted to the Committee the urgency of the situation:
>
> I am here to speak to you as one elected official to another, and to impart a very important message from local elected officials across the country. That message is simple. Local government officials can no longer effectively govern under the weight of the *Boulder* decision.

---

[10] Associated Press, August 8, 1983, available on NEXIS, August 2, 1984.

[11] The New York Times, February 19, 1984 at 47, Col. 5.

[12] S. 1578 would limit private remedies against local governments to injunctive relief under Section 16 of the Clayton Act, removing any award of damages under Sections 4, 4A, and 4C of the Clayton Act. The Senate Judiciary Committee reported the bill favorably on June 15, 1984. The Committee noted that this "remedy" approach was the initial step in addressing the issue of local government antitrust immunity. The Committee also concluded that the "remedy" approach was necessary to "allow local governments to go about their daily functions without paralyzing fear of antitrust lawsuits . . . ." The Judiciary Committee announced, however, that it would continue to study the broader issues of antitrust immunity for local governments. S. Rep. No. 593, 98th Cong., 2d Sess. 3 (1984). On August 8, 1984, the House of Representatives passed, by a vote of 414-5, H.R. 6027, which provides similar limitations on the remedies available against local governments and their officials. 130 Cong. Rec. 8622-24 (1984).

> The Committee has concluded that these and numerous other expressions of concern are well-founded. It would appear that in many instances, the practical impact of *Boulder* and *Lafayette* has been to paralyze the decisionmaking functions of local government. The threat of antitrust treble damage actions has caused local officials to avoid decisions that may touch on the antitrust laws even when such decisions have involved critical public services. Furthermore, it would also appear that uncertainty of whether particular actions may be anticompetitive might have lead [sic] to the making of no decision at all, resulting in, for example, the inclusion of all bidders for a franchise, rather than choosing the most economical and efficient bidder. In either case, where a local government has avoided the issue or where it has simply allowed all comers to participate, the public interest may not have been well-served. In addition the Committee is concerned by delays in the decisionmaking process during the pendency of time-consuming and costly antitrust damage litigation.

S. Rep. No. 593, 98th Cong., 2d Sess., 3 (1984)

II. PETITIONERS MISUNDERSTAND THE NATURE OF LOCAL GOVERNMENTS AND THEIR RELATIONSHIPS WITH STATE GOVERNMENTS.

A. Local Governments Are Not the Equivalent of Private Businesses; Local Government Actions Are Taken to Promote the Health, Safety, and Well-Being of Their Citizens and Are Not Taken Primarily for Economic Reasons.

The Petitioners' position is grounded upon a fundamental error in analysis. They approach the interaction between the City and the several Towns as if these governmental units were economic actors who compete in the marketplace. The Towns speak of competition with the City "in the market for sewage collection and transportation services."[13] The conduct of the City was ostensibly intended to "prevent the Towns from competing with the City in the sale of sewage collection

[13] Brief for Petitioners at 4.

and transportation services within the Towns."[14] A similar approach is taken by various of the *Amici*, notably the Town of St. Cloud, which describes as "illegal, anticompetitive conduct," an attempt by a city "to wield its monopoly control over waste water treatment services so as to force town residents and property owners to annex to the City."[15]

The application of marketplace analysis to the fundamentally governmental decisions in dispute in this litigation involves a misperception of the economic and governmental interests at stake. That such analysis can arguably find support in the language of this Court's decisions points to a striking need to restate the Court's position in this area so as to limit the impact of the Sherman Act to only those economic actors and decisions to which it was intended to apply.

Governments are not profit-maximizing units, but welfare-maximizing units: their purpose is to promote the welfare of their citizens. The maximization of this "public welfare" is seldom, if ever, the equivalent of the maximization of economic gain. For this reason, the application to governmental decisions of the antitrust laws does not necessarily further the laws' policies. As the Court has made clear, notably in *National Society of Professional Engineers* v. *United States*, 435 U.S. 679 (1978), the antitrust laws are designed to minimize price and maximize output, for presumably this maximizes the economic benefit of the society as a whole. However, untrammeled competition tends to minimize price and maximize output in a market only if the participants in that market are profit-maximizing units. If the objective of the economic actors is not to maximize profits, then there is no reason to believe that competition between them would tend to produce any socially beneficial result.[16]

[14] Brief for Petitioners at 12.

[15] Brief for *Amicus Curiae* the Town of St. Cloud, Minnesota at 9.

[16] *See* T. Calvani and J. Siegfried, Economic Analysis and Antitrust Law (1979), at 6-10, 13, 2[illegible]-22, 46-49.

It is a commonplace that no market is perfectly competitive. However, certain kinds of market failures are more important in the context of government regulation or the provision by government of various services. Notable among these is the existence of externalities. An externality occurs when a cost imposed by, or a benefit conferred upon, an economic actor is not adequately taken into account by the price system in a nominally competitive market. A classic example is pollution. The cost imposed on society by pollution is not taken into account by the marketplace and, thus, a hypothetical polluting industrialist does not receive the price signals that would cause him to maximize welfare in an economically efficient manner. Governments at all levels have attempted to correct this particular market failure by enacting legislation and ordinances penalizing pollution, concluding that such regulation is the manner best calculated to demonstrate to the polluter the true cost of his conduct to society. By intervening in the marketplace in this fashion, the various governments involved are attempting to maximize welfare in a more intangible sense than that quantifiable in purely monetary terms.[17]

Economic action by governmental units is necessarily motivated by aims other than profit. The balancing of these inherently unquantifiable aspects of a community's welfare is quintessentially the function of government.

This dichotomy between the motivating forces behind private and public action is clear in this case. It is undisputed that both the Petitioners and the Respondent are authorized by the laws of the State of Wisconsin to install sewage collection and treatment facilities to serve their citizens.[18] This authority was not granted to the Towns and the City in order to permit them to enter into commercial ventures for economic gain. Instead, this authority was granted in recognition of the desirability of local governments providing the essential public service of collecting and treating sewage to promote the health, safety,

---

[17] *See* Cirace, *An Economic Analysis of the "State-Municipal Action" Antitrust Cases*, 61 Tex. L. Rev. 481, 490, *et seq.* (1982).

[18] Wisconsin Stat. §§ 66.069, 66.076.

and well-being of their constituents. The manner in which sewage is collected and treated has obvious implications for the welfare and quality of life of a community, making it inappropriate to leave solely to individual choice.[19] The existence of sewers is so vital to the health and welfare of a community that the power to construct them is frequently presumed, without express grant.[20] The claim that the Towns seek to provide sewage service to their citizens in order to reap a profit or gain a monopoly would be incredible, but that is what the Towns charge motivated the City. Certainly, the Towns sought to provide sewer service to their citizens for the same non-economic reasons as did the City: to promote the health, safety, and well-being of their citizens.

As McQuillin, in his treatise on municipal affairs, has stated:

> It is elementary that all action on the part of the city or town must relate to public as distinguished from private affairs. That a city or town can exercise no other than public powers results from the fact that it is a public institution created and existing to serve the general interests of the people residing or coming within the city area, not as private individuals but as members of the political society.

1 E. McQuillin, *supra* note 19, at § 1.57.

The *Amici* urge the Court to recognize that local governments make decisions concerning regulatory action and the nature and scope of community services for essentially non-economic reasons. Local governments do not provide services to their citizens or make regulatory decisions to reap economic gain either for the governments themselves or for their citizens.

---

[19] 11 E. McQuillin, Municipal Corporations § 31.10 (3d ed. 1971). "The drainage of a city in the interest of the public health and welfare is one of the most important purposes for which the police power can be exercised." *New Orleans Gas Light Co.* v. *Drainage Comm'n of New Orleans*, 197 U.S. 453, 460 (1905).

[20] 11 E. McQuillin, *supra* note 19, at §§ 31.10, 31.10(a).

. . . Early the Supreme Court took the position that the city is a public institution, created for public purposes only and hence has none of the peculiar qualities and characteristics of a trading company instituted for purposes of private gain, except, of course, that of acting in a corporate capacity. With emphasis this tribunal says: "Its objects, its responsibilities and its powers are different." Private corporations are the private property of the corporators. They are designed to regulate private interests and exist only for private gain. The object of the city or town is governmental, not commercial. It is organized to make expenditures, not profits. Private gain, trading, speculation, or the derivation of pecuniary profit are not purposes or objects within the contemplation of the charter; and no powers are conferred to stimulate, encourage or advance such purposes further than the incidental encouragement and advancement which may follow a prudent exercise of the powers of local government.

A city "is vitally a political power"; it is but "an affluence from the sovereignty" of the state, governs for the state, and its authorized legislation and local administration of law are legislation and administration by the state through the agency of the city.

1 E. McQuillin, *supra* note 19, at § 1.57 (footnotes omitted).

It is abundantly true, as noted by the Court in the *City of Lafayette* v. *Louisiana Power & Light*, 435 U.S. 389, 417 at n. 48 (1978) that: "It may be that certain activities which might appear anticompetitive when engaged in by private parties, take on a different complexion when adopted by a local government." They take on this different complexion because they are the product of a decision-making process motivated by concern over the health, safety, and well-being of citizens. The application to these decisions of an analytical framework developed to deal with the conduct of firms motivated by economic considerations is inappropriate, not the least because there is no theoretical basis to believe that it will result in a socially or economically beneficial result.

B. The Interpretation of the State Action Doctrine Advanced by the Petitioners Would Unreasonably Interfere With the Rights of States to Organize the Manner in Which They Provide Government Services to Their Citizens.

It apparently is the Petitioner's position that there can be no protection from antitrust liability unless a local government is completely bound by a rigid state mandate to follow only a single course of action. The Petitioners argue that state authority to displace competition is not sufficient if the question of "*if*, when, how, under what circumstances, or with what effects the authority is to be exercised" is left to the local government unit.[21]

This position grossly misstates the Court's formulation of the requirements for the extension of state action immunity to local government action. Many activities of local governments, and virtually all their regulatory actions, have some effect on competition.

Requiring an explicit state mandate for each individual local government action that might have an anticompetitive effect would eviscerate local government, shifting all decisions of any importance from the local to the state level. The diversity and flexibility of the state system has always been considered vital to the effective governance of the nation, and the political subdivisions of the States are necessary tools in the implementation of a federal system. It has always been supposed that not only the States, but also their political subdivisions, had vast leeway in the management of their internal affairs.[22] Political subdivisions of States, such as counties and cities, are created as agencies for exercising such of the governmental powers of the States as might be entrusted to them. The number, nature, and duration of the powers conferred upon them, and the territory over which those powers shall be exercised, has

[21] Brief for Petitioners at 40 (emphasis in orginal).

[22] *See Sailors* v. *Board of Education*, 387 U.S. 105, 109 (1967).

always been supposed to rest in the absolute discretion of the States.[23]

The federal Constitution does not impose on the States any particular plans for the distribution of governmental powers.[24] The principle advanced by the Petitioners would certainly interfere with the freedom of States, through their subordinate bodies, "to structure integral operations in areas of traditional governmental functions."[25] The refusal to permit the States to devolve authority to subordinate governmental units makes the States' residual sovereignty illusory.

One of the chief advantages of a decentralized system is the diversity that it permits, allowing experimentation in response to local problems.[26] The essence of federalism is the freedom of the States to develop a variety of solutions to problems so that they are not forced into common, uniform molds.[27] It has generally been assumed that States may properly determine that local governments are best able to assess the needs and desires of their communities and, therefore, can most wisely enact the legislation addressing local concerns.[28] The policy decisions that result, although made by a municipality, have typically been accorded great deference by the Court, even though important rights were implicated.[29] Surely it should be within the competence of States to determine that the local regulation

---

[23] *See Hunter* v. *City of Pittsburgh*, 207 U.S. 161, 178-179 (1907).

[24] *See Sweezy* v. *New Hampshire*, 354 U.S. 234, 255-257 (1957) (Frankfurter, J., concurring).

[25] *National League of Cities* v. *Usery*, 426 U.S. 833, 852 (1976). *See also Equal Employment Opportunity Commission* v. *Wyoming*, 460 U.S. 226 (1983).

[26] *See Sailors* v. *Board of Education*, 387 U.S. 105, 109-112 (1967). *See also Francis* v. *State of Maryland*, 605 F.2d 747 (4th Cir. 1979); *Avens* v. *Wright*, 320 F.Supp. 677 (W.D. Va. 1970).

[27] *Addington* v. *Texas*, 441 U.S. 418 (1979).

[28] *Quilici* v. *Village of Morton Grove*, 695 F.2d 261 (7th Cir. 1982), *cert. den.*, ___ U.S. ___, 104 S.Ct. 194 (1983).

[29] *City of Memphis* v. *Greene*, 451 U.S. 100 (1981).

of a given economic activity, in accordance with a community's perception of local conditions, is the best allocation of authority. The ability to make such decisions is the essence of local autonomy.

The plurality opinion in *Lafayette* rejected the arguments that the Petitioners now make concerning the specificity of the state mandate required to permit local governments to avoid antitrust liability.

> . . . This does not mean, however, that a political subdivision necessarily must be able to point to a specific, detailed legislative authorization before it properly may assert a *Parker* defense to an antitrust suit. While a subordinate government unit's claim to a *Parker* immunity is not as readily established as the same claim by a state government sued as such, we agree with the Court of Appeals that an adequate state mandate for anticompetitive activities of cities and other subordinate governmental units exists when it is found "from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of."

435 U.S. at 415.

Neither *Boulder* nor any of the other cases decided subsequent to *Lafayette* supplemented the requirement of state authorization with one that the States mandate the activity in such specific terms that local governments would be subordinated to a purely ministerial role.

The approach advanced by the Petitioners has grave implications for the concept of federalism, for it would interfere with the ability of the various States to structure their governments as they see fit, and, in particular, to devolve decision-making power to subordinate governmental units. A federal system, with its concept of decentralized sovereignty, requires deference to the decisions of the various States concerning their manner of internal organization.[30]

---

[30] *See, e.g., Holt Civic Club* v. *City of Tuscaloosa*, 439 U.S. 60, 71 (1978).

The Petitioners suggest that local governments could avoid the risk of antitrust liability by obtaining specific state legislation, accompanied by the creation of state offices to supervise the details of the local government action in question. It is politically and practically impossible to seek the State's formal blessing for each action that a local government might take that could conceivably have some effect on commerce. Among the chief attributes, and advantages, of local governments are their flexibility in the face of new and changing circumstances, and their responses to community concerns. If local authorities need seek specific state authorization and supervision before acting in any area touching upon commerce, the ramifications of which are perhaps not fully foreseen, the purpose of local government would be greatly limited, and local government units would become little more than investigative committees for state legislatures. Given that many state legislatures do not sit continuously, the ability of local government to respond to new developments or changing circumstances would be eliminated.

III. CONGRESS DID NOT INTEND FOR THE SHERMAN ACT TO APPLY TO ACTIONS OF LOCAL GOVERNMENTS AUTHORIZED BY STATE LAW.

The legislative history of the Sherman Act demonstrates that the Act was designed to control profit-motivated business combinations, exemplified by the monopolistic business trusts of the era. The legislative history amply shows that Congress understood and intended that non-commercial combinations undertaken to promote governmental purposes would not be within the proscriptions of the Sherman Act. The legislative history thus clearly supports an interpretation of the Sherman Act that protects from the Act's penalties local government units undertaking activities authorized by state law.[31]

[31] In a number of other contexts, this Court has narrowed the scope of coverage of the Sherman Act. *E.g. Standard Oil Co. of N.J.* v. *United States*, 221 U.S. 1 (1911); *Chicago Board of Trade* v. *United States*, 246 U.S. 231 (1918); *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469 (1940); *Eastern Railroad Pres. Conf.* v. *Noerr Motor Frgt. Inc.*, 365 U.S. 127 (1961). Refinement of the definition of the scope of the Sherman Act, especially when important state interests are involved, should be distinguished from the creation of an implied exemption to the Act. *Community Communications Co.* v. *City of Boulder*, 455 U.S. 40, 60, *et seq.* (1982) (Rehnquist, J., dissenting).

A. Congress Understood That the Reach of the Sherman Act Did Not Extend to Actions, Such as Those of Local Government, to Implement State Law.

The legislative history of the Sherman Act provides positive indication that Congress understood that local government activities authorized by state law would not be within the proscriptions of the Act. This evidence supports the conclusion that the Sherman Act should be held inapplicable to local government activities that are undertaken pursuant to state authority.

Following the introduction of S.1 by Senator John Sherman on December 4, 1889,[32] the Senate, sitting as a Committee of the Whole, undertook extensive debate on the form that the "trust bill" should take.[33] A number of amendments on a variety of subjects were offered to what had begun as a relatively succinct bill. The bill in its amended form was reprinted on March 18, March 25, and March 26, 1890, to include the various amendments.[34] By the time the bill was reprinted for the third time, the body had grown from three sections comprising some 39 lines of text to 16 sections comprising 309 lines of text.

[32] S. 1, 51st Cong., 1st Sess., December 4, 1889, was identical to S. 3445, 50th Cong. 2d Sess., which was reported by the Committee on Finance on September 11, 1888. Both bills were titled, "A Bill to declare unlawful trusts and combinations in restraint of trade and production."

[33] S. 1 was referred to the Senate Finance Committee upon its introduction, 21 Cong. Rec. 96 (1890), from which it was reported on January 14, 1890, with minor amendments. 21 Cong. Rec. 541 (1890). The Senate's debate commenced February 27, 1890.

[34] Senator Sherman introduced a substitute bill as reported from the Senate Finance Committee on March 21, 1890, 21 Cong. Rec. 2455 (1890), to incorporate Committee amendments. The bill was reprinted on March 25, 1890, to incorporate amendments offered while the Senate was sitting as a Committee of the Whole on March 21, March 24, and March 25, 1890. 21 Cong. Rec. 2616 (1890). The bill was again printed the next day to incorporate further amendments offered during the final day in which the Senate considered the bill as a Committee of the Whole. 21 Cong. Rec. 2662 (1890).

Apparently because it had grown to such unmanageable proportions, the Senate interrupted its consideration of the various amendments and referred the bill to the Senate Judiciary Committee.[35] When it emerged from the Judiciary Committee, S.1 had been refashioned without the extensive amendments offered during the earlier debate.[36]

Although S.1 was amended in a number of respects during its consideration by the Senate sitting as a Committee of the Whole, one amendment is of particular note. During the debate on March 26, 1890, Senator Wilson of Iowa offered an amendment that exempted from the coverage of the Sherman Act "any arrangements, agreements, associations, or combinations among persons for the enforcement and execution of the laws of any State enacted in pursuance of its police powers . . . ." Senator Wilson's amendment further stated "nor shall this act be held to control or abridge such powers of the States."[37] The amendment was adopted by the Senate sitting as a Committee of the Whole after the following debate:

> [Mr. WILSON of Iowa]: I will state frankly my purpose in offering the amendment. Under the provisions of this section, should it become a law, every organization in such a State as Iowa, for instance, of the character of the Woman's Christian Temperance Union, the Temperance Alliance, and other organizations intended to promote the execution of the laws of that State in respect of the manufacture and sale of intoxicating liquors would become illegal bodies and their movements subject to the terms and provisions of this bill. I know that was not intended, and

[35] 21 Cong. Rec. 2731 (1890). The Senate sitting as a Committee of the Whole had rejected two earlier attempts to refer the bill to the Judiciary Committee, 21 Cong. Rec. 2610-11 (1890) and 21 Cong. Rec. 2660 (1890), and an attempt to refer it to the Finance Committee. 21 Cong. Rec. 2659-60 (1890). A third attempt to refer the bill to the Judiciary Committee had been withdrawn. 21 Cong. Rec. 2655-57 (1890).

[36] 21 Cong. Rec. 2901 (1890).

[37] 21 Cong. Rec. 2658 (1890). The amendment was to be added to Section 1 which had been separately amended to exclude workers and farmers from the Act's coverage. This amendment, which had been offered by Senator Sherman, "was evidently introduced to calm those who, unlike Sherman himself, feared that labor and farm organizations might be affected by the bill." H. Thorelli, The Federal Antitrust Policy 193 (1954).

> yet the language, without being stripped of its power by the amendment I propose, would include all organizations of that kind. All I ask is that the the subjects within the police power of the States as embraced within that legislation, of Iowa and any other State which may desire similar legislation, shall not be embraced within this provision, but that the States shall be left free in the execution of their police powers.
>
> . . .
>
> I will just add to what I have said that the proviso to which I offered this as an amendment excepts from the operations of this section of the bill arrangements, agreements, or combinations between laborers made with a view of lessening the number of hours of their labor or of increasing their wages, and it also excepts arrangements, agreements, associations, or combinations among persons engaged in horticulture or agriculture, made with a view of enhancing the price of their own agricultural or horticultural products. I think that the exception which I ask to have made by this amendment is quite as worthy of the support of the Senate as either of these.
>
> Mr. HOAR. Allow me to ask the Senator if his amendment accomplishes his object. I understand his object is to protect combinations of persons intended to discourage the use and manufacture of intoxicating liquors.
>
> Mr. WILSON, of Iowa. My object is to exclude them from the operation of the bill.
>
> Mr. HOAR. I understand, to protect them from being affected by it. But the only description in his amendment is of such associations as are in aid of the execution of the laws of a State in pursuance of its police power. Now, if this bill without his amendment would render the class of persons he has described subject to the penal provision, all temperance societies whose object is to persuade mankind not to use intoxicating liquors would still remain in spite of his amendment within the purview of the bill. It seems to me he should extend his amendment a little further, because, as far as my State goes, this class of associations which he has described do not confine their efforts to the execution of the law, but their efforts are a great deal more extensive and extend to discouraging the use or manufacture of intoxicating liquors altogether. This is what he means, and we would all vote for it.

Mr. WILSON, of Iowa. I am satisfied that my amendment will cover the purpose I have in view concerning my State. If other Senators desire something further in regard to their States, they can move it.

Mr. HOAR. I move to amend the Senator's amendment by adding to it:

> Or to discourage the use or manufacture of intoxicating liquors.

And we will take a vote on that.

. . .

The PRESIDING OFFICER. The question is on agreeing to the amendment to the amendment.

Mr. SHERMAN. The Senator from Iowa showed me his amendment. As these organizations in Iowa are associated and organized in something in the nature of a corporation, there might be some reason for believing that they possibly might fall within the meaning of the clauses of the bill. Therefore, I have no objection to his amendment, but I do not see any reason for putting in temperance societies any more than churches or school-houses or any other kind of moral or educational associations that may be organized. Such an association is not in any sense a combination or arrangement made to interfere with interstate commerce; but under the peculiar circumstances, upon the facts stated by the Senator from Iowa, I think it is very proper to make an exception of those organizations in Iowa which are really in aid of the execution of State law. I would apply it to all organizations which are using either moral or any other kind of means for the enforcement of local laws; but I do not think it is worth while to adopt the amendment of the Senator from Massachusetts, because that would include temperance societies. You might as well include churches and Sunday schools.

. . .

The PRESIDING OFFICER. The question recurs on the amendment of the Senator from Massachusetts to the amendment of the Senator from Iowa.

Mr. HOAR. I will withdraw my amendment solely in the interest of saving time.

The PRESIDING OFFICER. The question then recurs on the amendment of the Senator from Iowa [Mr. Wilson].

The amendment was agreed to.

21 Cong. Rec. 2658-59, 2660 (1890).

As this debate indicates, Senator Sherman felt that the amendment was not necessary to exclude combinations undertaken to aid in the execution or enforcement of state or local laws from the Act's coverage.[38] Although the amendment was specifically offered to include temperance groups within its protection, Senator Wilson declined to narrow its coverage only to those groups, and a further amendment expressly identifying such groups was withdrawn.

Senator Wilson's amendment was adopted by the Senate sitting as a Committee of the Whole, but it was not adopted by the Senate in regular session, because the bill was referred to the Senate Judiciary Committee shortly before Senator Wilson's amendment was to be considered.[39] The version of S.1 that was subsequently reported by the Senate Judiciary Committee removed most of the amendments, including Senator Wilson's amendment. Also removed were amendments excluding from coverage such groups as farmers and laborers. It is reasonable to conclude that the Senate Judiciary Committee removed the Wilson amendment and the others because the Committee concluded that no express language was necessary to remove these types of activities from the coverage of the bill

---

[38] On two other occasions, Senator Sherman explained that his bill would not prohibit non-business combinations. In the first instance, he explained that S. 3445, which Senator Sherman had introduced in the previous session of Congress, would not have any effect upon voluntary community associations, such as temperance groups. 20 Cong. Rec. 1458 (1889). Subsequently, Senator Sherman rejected suggestions that S. 1 would prohibit combinations designed to promote interests of workers or farmers. "They are not business combinations." 21 Cong. Rec. 2562 (1890).

[39] 21 Cong. Rec. 2731 (1890).

as reported.[40] Senator Wilson did not deem it necessary to offer his amendment again following the Judiciary Committee's report of the revised bill.

The adoption by the Senate, sitting as a Committee of the Whole, of Senator Wilson's amendment, and the subsequent conclusion that neither this amendment nor other expressed exceptions were necessary to prevent the unintended coverage of noncommercial activities, strongly support the conclusion that Congress did not intend the Sherman Act to proscribe activities of local government undertaken in accordance with state law.

B. Common Law Restrictions on Restraints of Trade and Monopolies Did Not Apply to Local Government Activities.

Senator Sherman made it clear that the Act bearing his name was intended to codify or adopt the common law rules applied by the courts of England and of the American States to trade restraints and monopolies.[41] Representative Culberson, who was the floor manager of the bill in the House, explained the meaning of the term "monopoly" in the bill by adopting a definition equating the term with the common law concept of engrossing.[42]

One searches in vain for any indication that the courts of England or of the American States ever applied common law

---

[40] This is the interpretation thought to be most plausible by Mr. Thorelli. H. Thorelli, *supra* n. 37, at 232. S. 1 as reported by the Senate Judiciary Committee on April 2, 1890, eventually became the Sherman Act.

[41] 21 Cong. Rec. 2456, 2457 (1890). Senator Hoar, upon reporting S. 1 from the Judiciary Committee in the form eventually enacted, also indicated that the intent was to affirm the common law doctrines on these subjects. 21 Cong. Rec. 3146 (1890). *See* H. Thorelli, *supra* n. 37, at 181, 200, 201, 228.

[42] 21 Cong. Rec. 4090 (1890). Engrossing was the purchase of goods at wholesale by those who resold them at wholesale. *See* H. Thorelli, *supra* n.37, at 16. Senator Edmunds had previously adopted this definition in his comments in support of the version of S.1 reported on April 8, 1890, by the Senate Judiciary Committee. 21 Cong. Rec. 3152 (1890).

rules on trade restraints to any local government units.[43] Surely, if Congress had intended such a marked departure from the common law conception of restraint of trade, there would have been some comment in the debate to that effect. The clear indication that the Sherman Act was intended to adopt and apply common law rules relating to trade restraints, together with the fact that such rules were never applied to local government units, offers compelling evidence that Congress did not intend that the Sherman Act apply to local government actions.

C. Local Government Activities Were Not Among the Evils Sought to be Addressed by Congress in the Passage of the Sherman Act.

The legislative history of the Sherman Act is filled with descriptions of the evil sought to be cured by Congress. In every case, the focus of the Congressional interest was the commercial restraint upon trade, the business monopoly, or the trust.

Prior to the introduction of the Sherman Act in the 50th Congress, the House passed a resolution authorizing its Committee on Manufactures to investigate trusts and other commercial combinations.[44] The Committee's report, submitted some six months later, focused on the sugar and Standard Oil trusts and presented in some detail the manner of those trusts' organization.[45] Subsequently, a number of bills were introduced, including S. 3445, which was introduced by Senator Sherman on August 14, 1888.[46] In the course of debate on S.

---

[43] An excellent review of common law rules in England and America relating to trade restrictions is presented in Mr. Thorelli's treatise. H. Thorelli, *supra* n.37, at 9-107. Mr. Thorelli's survey does not identify any case in which common law restrictions on monopolies or trade restraints were applied to a local government unit.

[44] 19 Cong. Rec. 719 (1888).

[45] H.R. Rep. No. 3112, 50th Cong., 1st Sess. (1888).

[46] S. 3445 was not passed during the 50th Congress. It was reintroduced as S. 1 by Senator Sherman in the 51st Congress. S. 1 evolved into the Sherman Act.

3445, various Senators clearly indicated an intention that the bill would be addressed to commercial abuses of trade. Senator Jones of Arkansas expressed concern over the exercise of so broad a jurisdiction over commerce by Congress, but concluded that the exercise of such broad power was necessary, because "[t]he growth of these commercial monsters called trusts in the last few years has become appalling."[47] Senator Jones explained the evils caused by trusts that he sought to address:

> Now, however, having been allowed to grow and fatten upon the public, their success is an example of evil that has excited the greed and conscienceless rapacity of commercial sharks until in schools they are to be found now in every branch of trade, preying upon every industry, and by their unholy combinations robbing their victims, the general public, in defiance of every principle of law or morals.

20 Cong. Rec. 1457 (1889).

Following the introduction of S. 1 in the 51st Congress, Senator Sherman explained the public concern that motivated congressional attention to the trust problem:

> The popular mind is agitated with problems that may disturb social order, and among them all none is more threatening than the inequality of condition, of wealth, and opportunity that has grown within a single generation out of the concentration of capital into vast combinations to control production and trade and to break down competition. These combinations already defy or control powerful transportation corporations and reach State authorities. They reach out their Briarean arms to every part of our country. They are imported from abroad. Congress alone can deal with them, and if we are unwilling or unable there will soon be a trust for every production and a master to fix the price for every necessity of life.

21 Cong. Rec. 2460 (1890).

---

[47] 20 Cong. Rec. 1457 (1889).

Senator Sherman subsequently quoted with approval Senator George's statement of the problem before Congress:

> "These trusts and combinations are great wrongs to the people. They have invaded many of the most important branches of business. They operate with a double-edged sword. They increase beyond reason the costs of the necessaries of life and business, and they decrease the cost of the raw material, the farm products of the country. They regulate prices at their will, depress the price of what they buy and increase the price of what they sell. They aggregate to themselves great, enormous wealth by extortion which makes the people poor. Then, making this extorted wealth the means of further extortion from their unfortunate victims, the people of the United States, they pursue unmolested, unrestrained by law, their ceaseless round of peculation under the law, until they are fast producing that condition in our people in which the great mass of them are the servitors of those, who have this aggregated wealth at their command."

21 Cong. Rec. 2461 (1890).

Throughout the debates, each Senator or Representative who described the problem sought to be remedied by the antitrust legislation that was to become the Sherman Act clearly stated that it was commercial monopolies and commercial trusts that would be restrained. None stated that the object of the bill was to in any way restrain the actions of local government units as authorized by state law.[48]

---

[48] *See also* Comments of Senator George, 21 Cong. Rec. 2597-98 (1890); Comments of Senator Hoar, 21 Cong. Rec. 2728 (1890) ("When . . . we are dealing with . . . the combinations aimed at chiefly by this bill, we are dealing with a transaction the only purpose of which is to extort from the community, monopolize, segregate, and apply to individual use, for the purposes of individual greed, wealth which ought properly and lawfully and for the public interest to be generally diffused over the whole community."); Comments of Representative Wilson, 21 Cong. Rec. 4092 (1890) (description of operation of trusts); Comments of Representative Heard, 21 Cong. Rec. 4101 (1890); Comments of Representative Taylor, 21 Cong. Rec. 4098 (1890).

D. Congress Did Not Intend to Displace State Control of Local Government Activities that Affect Competition.

In adopting the Sherman Act, Congress intended only to apply its federally-stated policy in the realm of interstate commerce, which could not be controlled effectively by the several States. As Senator Sherman explained following the introduction in the 51st Congress of his bill to control restraints of trade:

> Each State can deal with a combination within the State, but only the General Government can deal with combinations reaching not only the several States, but the commercial world. This bill does not include combinations within a State, but if the Senator from Mississippi can make this clearer any proposition he will make to that effect will certainly be accepted and I will cheerfully vote for his proposition.

21 Cong. Rec. 2460 (1890).[49]

As Senator Sherman's remarks indicate, Congress in 1890 believed that its jurisdiction over interstate commerce was narrower than has been held by subsequent cases.[50] Nevertheless, Congress clearly understood that it was not acting to interfere with efforts of the States to control restraints of trade occurring within their borders. For example, Senator Sherman explained that, "[e]ach State can and does prevent and control combinations within the limit of the State. This we do not propose to interfere with."[51] The Senator's intention was mirrored by the report of the House Judiciary Committee which favorably recommended the passage of the Sherman Act:

> No attempt is made to invade the legislative authority of the several States or to even occupy doubtful grounds. No system of laws can be devised by Congress alone which

[49] Senator Sherman referred to Senator George of Mississippi, who had questioned the constitutionality of S. 1. *See* 21 Cong. Rec. 1765-1772 (1890).

[50] *See, e.g., Hospital Building Co.* v. *Trustees of Rex Hospital*, 425 U.S. 738, 743 (1976).

[51] 21 Cong. Rec. 2456 (1890).

> would effectually protect the people of the United States against the evils and oppression of trusts and monopolies. . . .
>
> It follows, therefore, that the legislative authority of Congress and that of the several States must be exerted to secure the suppression of restraints upon trade and monopolies. Whatever legislation Congress may enact on this subject, within the limits of its authority, will prove of little value unless the States shall supplement it by such auxiliary and proper legislation as may be within their legislative authority.

H.R. Rep.1707, 51st Cong., 1st Sess., 1 (1890).[52]

IV. THE PROPER CONSTRUCTION OF THE SHERMAN ACT SHOULD RECOGNIZE THE REALITIES OF STATE AND LOCAL RELATIONSHIPS AND THE CHARACTER OF LOCAL GOVERNMENT DECISION-MAKING.

The *Amici* ask only that the Sherman Act be interpreted in a manner consistent with the intent of Congress in enacting the legislation. Then, as now, local governments sought to promote the welfare of their citizens through appropriate regulation and through the provision of necessary government services. Then, as now, local governments sought to respond effectively and promptly to the needs of their citizens. This activity by local governments, with its undeniable effect on commerce, was taken as given by the Congress in 1890, so much so that it did not even prompt debate. In the more than 80 years between the enactment of the Sherman Act and the Court's opinion in *City of Lafayette* v. *Louisiana Power and Light Company*, 435 U.S. 389 (1978), it was assumed that the Sherman Act did not apply to the activities of local governments, and Congress took no action to extend the Act's coverage. During this time, local governments continued to do what local governments are sup-

[52] *See, e.g.*, comments of Representative Taylor: "This monster robs the farmer on the one hand and the consumer on the other. This bill proposes to destroy such monopolies, such destructive tyrants, and goes as far in that direction as Congress has the power to go under the Constitution. Our action must be supplemented by action of the States, for we can only deal with interstate transactions." 21 Cong. Rec. 4098 (1890).

posed to do: They responded to changing conditions and the changing needs of their citizens; they sought to promote the general welfare by providing services commonplace at the time of the Sherman Act's passage and by responding to their citizens' demands for new services in the intervening years.

It is the responsibility of state and local governments to promote the health, safety, and well-being of their citizens. These governments accomplish this task by using methods determined to be appropriate by government officials who are informed and constrained by the democratic process. The States, initially, must create, and establish the purpose for, local government units, and they express their judgments by a grant of power to local government units to fulfill those purposes. When the States issue broad grants of local government authority to deal with particular issues, the States have determined that the health, safety, and well-being of their citizens can best be protected by actions undertaken at the local level.

Local government units should be immune from antitrust liability when their actions affecting competition reasonably follow from authority granted to the local government units by the States. In particular, the Court should hold that state authority for a local government unit to act in a particular area affecting commerce should be deemed to constitute a clearly articulated and affirmatively expressed intention to displace competition, as that test has been articulated in prior decisions of this Court. There should be no requirement of active state supervision of these actions of the local government, for such a requirement would be redundant and would defeat the purpose of local government.

The Court must recognize that local governments act for public reasons, not for economic ones. The exclusive goal of local government is not and should not be economic efficiency. The very existence of government is a recognition that individual action, unconstrained, does not produce a workable society. Local governments smooth the rough edges of society closest to the individual. An appreciation of this role of local government is sorely lacking in the interpretation of the Sherman Act advanced by the Petitioners, and, unfortunately, in several of the opinions of this Court.

The *Amici* submit that their suggested approach strikes the proper balance between the interests promoted by the Sherman Act and the need of local governments to protect and serve their citizens. It is a balance that was established by Congress in its passage of the Sherman Act and was only of late upset. It is a balance that should be restored by this Court.

CONCLUSION

Amici Curiae, the American Public Power Association, the American Association of Port Authorities, the City of Cleveland, Ohio, the Michigan Cities of Detroit, Grand Rapids, Lansing, and Traverse City, and the Tennessee Cities of Nashville, Memphis, and Chattanooga join Respondent, the City of Eau Claire, in requesting that the judgment of the Court of Appeals be affirmed.

Respectfully submitted,

CARLOS C. SMITH
Counsel of Record
FREDERICK L. HITCHCOCK
EDWARD D. MEYER
STRANG, FLETCHER, CARRIGER, WALKER, HODGE & SMITH
1200 Maclellan Building
Chattanooga, Tennessee 37402
(615) 266-2721
Counsel for Amici Curiae

JOHN W. PESTLE
VARNUM, RIDDERING, SCHMIDT & HOWLETT
Suite 800
171 Monroe Avenue, N.W.
Grand Rapids, Michigan 49503
(616) 459-4186
Special Counsel for the Michigan Cities of Detroit, Grand Rapids, Lansing and Traverse City

STANLEY P. HEBERT
66 Jack London Square
Oakland, California 94606
(415) 444-3188
Special Counsel for American Association of Port Authorities

JOHN D. MADDOX
Director of Law
JUNE W. WIENER
Assistant Director of Law
City Hall Room 106
601 Lakeside Avenue
Cleveland, Ohio 44114
(216) 664-2800
Counsel for City of Cleveland, Ohio

DONALD W. JONES
Metropolitan Attorney
204 Metropolitan Courthouse
Nashville, Tennessee 37201
(615) 259-6134
Counsel for the Metropolitan Government of Nashville and Davidson County, Tennessee

CLIFFORD D. PIERCE, JR.
City Attorney
City Hall Room 314
125 North Main Street
Memphis, Tennessee 38103
(901) 526-6701
Counsel for the City of Memphis, Tennessee

EUGENE N. COLLINS
City Attorney
RANDALL L. NELSON
Special Counsel
400 Pioneer Bank Building
Chattanooga, Tennessee 37402
(615) 756-2291
Counsel for the City of Chattanooga, Tennessee

September 14, 1984